

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

HIDDEN HILLS MANAGEMENT, LLC,  
and 334TH PLACE 2001, LLC,

Plaintiffs,

v.

AMTAX HOLDINGS 114, LLC, and  
AMTAX HOLDINGS 169, LLC,

Defendants.

AMTAX HOLDINGS 114, LLC, AMTAX  
HOLDINGS 169, LLC, and PARKWAY  
APARTMENTS, LP

Counter-Plaintiffs,

v.

HIDDEN HILLS MANAGEMENT, LLC,  
and 334TH PLACE 2001, LLC,

Counter-Defendants.

No. 3:17-cv-06048-RBL

HIDDEN HILLS MANAGEMENT, LLC's  
CROSS MOTION FOR SUMMARY  
JUDGMENT AND OPPOSITION TO  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:

AMTAX's MOTION: February 15, 2019

HHM'S CROSS MOTION: March 8, 2019

OPPOSITION AND CROSS MOTION FOR SUMMARY JUDGMENT  
(3:17-cv-06048-RBL)

## I. INTRODUCTION AND SUMMARY

The Limited Partnership Agreement (“**LPA**”) of Hidden Hills 2001, LP (“**Hidden Hills**” or the “**Partnership**”) dates back to January 1, 2002. Hidden Hills Management LLC (“**HHM**” or the “**GP**”) has been part of the Partnership from the beginning. Its managing member, Catherine Tamaro, was involved in the Partnership’s formation, the acquisition of the Hidden Hills property from the previous owner and the negotiations with the lenders and regulatory agencies.

The negotiation began in 1999. It took three years to complete because the soils at Hidden Hills were found to have high levels of arsenic and lead. The Department of Ecology (“**Ecology**”) listed Hidden Hills as a highly contaminated site. Potential lenders declined to finance the deal unless the contamination was remediated. The Partnership finally secured financing from ARCS mortgage, a Fannie Mae lender. The financing was conditioned on the Partnership placing \$1.25 million in escrow for environmental cleanup, based on the 1999 and 2000 soil characterization reports by Environmental Partners, Inc. (“**EPI**”).

The GP contributed cash to the Partnership in connection with the purchase and deferred the payment of fees it was otherwise owed in order to fund the escrow. If the cleanup was required and the escrow funds were insufficient, the GP was required to pay the difference. If the LP exited the partnership in a buyout, the GP remained responsible for any future cleanup, whether voluntary or required by Ecology or a lender. To date Ecology has not required a cleanup. The escrow has grown to \$1.5 million.

AMTAX Holdings 114, LLC’s (“**AMTAX 114**” or the “**LP**”) current manager, Alden Torch, knows little about the Partnership’s history. It came to the Partnership in late 2011, when it acquired other unrelated AMTAX LP interests governed by similar agreements. In its motion for summary judgment, AMTAX seeks to defeat the GP’s option to buy out its interest under § 7.4.J of the LPA. It faults the GP for sharing historic and updated information about contamination and cleanup with the appraisers retained to determine the buyout price under

§ 7.4.J, and insists that the risk of future cleanup and the related difficulty of financing (or refinancing) the property is not “real.” AMTAX insists that the property should instead be put on the market under § 7.4.K of the LPA, and purported to remove the GP to achieve that goal.

But the LPA does not give that choice to the LP. After managing the property diligently for 16 years and delivering to the LP the maximum tax credits and write-offs that the low income housing tax credit (“LIHTC”) partnership is designed to provide, the GP has earned the right to buy AMTAX out under § 7.4.J, at the price determined by the third appraisal, if, as here, the first two appraisals disagree on value. Here, the first two appraisals were over \$5 million apart. The third appraisal was prepared by experienced appraisers at Colliers International (“Colliers”). There is no dispute that they considered all available information, including some brokers’ view that contamination has little effect on value, and valued the property at \$13.5 million. The Colliers appraiser testified that his appraisal reflected his independent judgment and was in no way influenced by Ms. Tamaro. As a matter of law that is all § 7.4.J requires.

To be sure, the GP and the LP have very different and equally strong views on whether the existing contamination and related scarcity of financing are relevant to the value of Hidden Hills. But the Court does not need to resolve this disagreement. That is the point of agreeing in advance to a third, and binding, appraisal. AMTAX’s accusations against Ms. Tamaro do not override the agreed-upon contractual mechanism for setting the buyout price. AMTAX does not challenge Colliers appraiser’s credentials or offer any competent evidence to contradict his testimony that the appraisal was the result of his independent professional judgment. The GP is entitled to a judgment as a matter of law that requires AMTAX to honor the terms of the LPA.

## II. FACTS AND PROCEDURAL BACKGROUND

### A. The Partnership Purchases the Property in 2002

The property is located in University Place. It was built in 1984 and has 216 units. Dkt. # 64 (cited herein as “Pettit Decl.” Ex. 33 (Colliers appraisal)). It was in the plume of the ASARCO smelter. *Id.* at 30 (HHM-2622). But the issue is not merely that the property was in

1 the smelter plume. In 1998, Tacoma Water selected the property as one of its test sites, and the  
 2 soil tested for high levels of lead and arsenic. *Id.*, Ex. 30 (cited herein as “Tamaro TRO Decl.” ¶  
 3 6, Ex. C). After more testing in 1999, Ecology listed the property on its “Confirmed and  
 4 Suspected Contaminated Sites List.” *Id.* ¶ 7; Ex. 33 (Colliers appraisal at 30). It is undisputed  
 5 that this property is publicly listed as a contaminated property. Pritchard Decl. Ex. T (Answer to  
 6 RFA 10).

7 HHM negotiated and facilitated the purchase of the Hidden Hills property on behalf of  
 8 the Partnership, which was formed to place the property in the LIHTC program. Tamaro TRO  
 9 Decl. ¶ 6; Tamaro Decl. ¶ 1. The contamination made the negotiations difficult. Sullivan Decl. ¶  
 10 4; Hallgrimson Decl. ¶ 2. The first two lenders contacted by HHM wanted the arsenic and lead  
 11 remediated before it would close the loan. Sullivan Decl. ¶ 9. Another lender did not require a  
 12 cleanup but instead mandated the funding of an escrow account, in the amount of approximately  
 13 \$1.25 million, in the event that the cleanup was required (the “**Environmental Escrow**”). *Id.* In  
 14 May 1999, the draft purchase and sale agreement with the seller reflected a purchase price of  
 15 \$9.8 million. Pritchard Decl., Ex. A at HHM-008312. When the transaction finally closed on  
 16 January 30, 2002, the final purchase price was \$8,900,000, reflecting a significant  
 17 contamination-related discount. *Id.* Ex. B (excise tax affidavit); Tamaro TRO Decl. ¶ 10;  
 18 Sullivan Decl. ¶ 5.

## 19 **B. The Project Documents**

20 The main project document, *the LPA*, allowed the LP to receive LIHTC credits in return  
 21 for its investment of \$ 3.57 million.<sup>1</sup> Pettit Decl., Ex. 1 (cited herein as “LPA”). The tax credits  
 22 are the primary purpose of these investments. Over the fifteen year compliance period, AMTAX  
 23

---

24 <sup>1</sup> Section 42 of the Internal Revenue Code permits investors who commit capital to  
 25 affordable housing projects to earn tax credits. The tax credits are fully earned and retained  
 26 during the fifteen-year compliance period. Tamaro Decl. ¶ 1; Dkt. # 37 (AMTAX  
 Counterclaims ¶¶ 24-27).

1 114 received \$4.55 million in federal tax credits, \$3.57 million in federal tax write-offs, and  
 2 \$188,000 in management fees. Tamaro Decl. ¶ 3. HHM contributed \$700,962 to the Partnership  
 3 at closing, but in order to ensure that AMTAX 114 received its full 99.9% share of the tax  
 4 credits, HHM's contribution was accounted for as a "General Partner Loan" under the LPA. *See*  
 5 Tamaro Decl. ¶ 2; LPA at 9. HHM also deferred receipt of fees it was owed in order to fund the  
 6 Environmental Escrow. Tamaro Decl. ¶ 2. HHM has managed the Partnership since January  
 7 2002. *Id.* ¶ 3.

8 Section 7.4.J of the LPA gives HHM an option to purchase the LP's interest during the  
 9 two years after the end of the compliance period. LPA § 7.4.J.<sup>2</sup> The price of the interest is based  
 10 on the fair market value of the property held by the Partnership. *Id.* Fair market value, for the  
 11 purposes of the buyout option, "shall be determined by two independent MAI [Member of the  
 12 Appraisal Institute] appraisers: one selected by the Managing General Partner and one by the  
 13 Investor Limited Partner. If such appraisers are unable to agree on the value, they shall jointly  
 14 appoint a third independent MAI appraiser whose determination shall be final and binding." *Id.*  
 15 There are no other provisions in the LPA addressing the requirements for the appraisal process.

16 The project documents also included the *Environmental Escrow Agreement*. Pettit  
 17 Decl. Ex. 3. This agreement (a condition of the Fannie Mae financing) required the Partnership  
 18 to fund an interest-bearing escrow account to use for remediation costs in the event a clean-up  
 19 was required. At the insistence of Paramount Financial Group, Inc. ("**Paramount**"), AMTAX  
 20 114's original manager, HHM funded the Environmental Escrow by, among other things,  
 21 deferring the payment of fees that were otherwise be owed to the GP. Sullivan Decl. ¶ 5;  
 22 Tamaro Decl. ¶ 2. In connection with a buyout of the LP's interest, the funds in the  
 23  
 24

---

25 <sup>2</sup> Section 7.4.K provides a forced sale right to the LP, which is expressly subject to the  
 26 buyout option in Section 7.4.J.

1 Environmental Escrow will be divided up between the partners. *See* LPA §§6.2(B) and 7.8(D);  
 2 Pritchard Decl. Ex. C (Tamaro Dep. at 446).

3 HHM and AMTAX 114 also entered into a separate ***Environmental Indemnity & ADA***  
 4 ***Compliance Agreement*** (“***Indemnity***”). *See* Pettit Decl. Ex. 2. Except for Paragraph 2, the  
 5 Indemnity was a standard form agreement that AMTAX 114 drafted and used for each of the  
 6 partnerships in which an AMTAX entity invested. *See, e.g.*, Pritchard Decl. Ex. D ((blacklined  
 7 Indemnity Agreement adding Paragraph 2)); Ex. E (AMTAX cover letter indicating the  
 8 Indemnity is a standard form); Ex. F (Parkway indemnity). Paragraph 2 memorialized the  
 9 environmental contamination of the Property with lead and arsenic. Paragraph 4 stated the  
 10 standard terms of the indemnity. Paragraph 8 contained an integration clause.

11 Those familiar with the parties’ intent when it was signed stated that the Indemnity “had  
 12 nothing to do with any diminution of the property value, as that issue was addressed at the time  
 13 of acquisition by the seller’s reduction of the price paid by the Partnership.” Sullivan Decl. ¶ 7.  
 14 AMTAX 114’s original internal financial projections also show that it had no expectation that  
 15 the Partnership property would have any residual value that would be distributed to the LP at the  
 16 end of the compliance period. Gibson Decl. ¶ 5, Exs. A & B. Thus, the Indemnity was not  
 17 intended to address the terms of any buyout after the compliance period. *Id.* ¶¶ 4-7.

18 AMTAX 114’s current manager is not familiar with this history. In 2001, the LP was  
 19 managed by Paramount, which signed both the LPA and the Indemnity on behalf of AMTAX  
 20 114. In the mid-2000s, Paramount was absorbed by Capmark, another LIHTC housing asset  
 21 management firm. Pritchard Decl. Ex. G (HH Blake Dep. at 10); Ex. H (Parkway Blake Dep. at  
 22 10). Hunt Companies purchased Capmark in bankruptcy in 2011, and ultimately became Alden  
 23 Torch in 2015. *Id.* Ex. H (Parkway Blake Dep. at 10-11, 13 (“It was effectively a name  
 24 change.”). AMTAX 114’s representative is Chris Blake, the Director of Capital Transactions at  
 25 Alden Torch. He testified that Alden Torch inherited those agreements when it took over the  
 26

1 asset management function for AMTAX 114 in late 2011, almost ten years after the agreements  
2 had been executed. *See id.* Ex. G (HH Blake Dep. at 76).

3 **C. Before the End of the Compliance Period HHM Contacts Lenders, CBRE,  
4 and EPI Regarding Hidden Hills**

5 Catherine Tamaro first reached out to Todd Henderson at CBRE in the fall of 2015 to  
6 appraise the Hidden Hills property (among others) for a property tax appeal and to gauge a  
7 potential early buyout of the LP's interest. Pritchard Decl. Ex. I. She generally discussed the  
8 environmental issues with CBRE at that time, explained the history of the site, and sent a packet  
9 of related documents and correspondence. *Id.* Ex. C (Tamaro Dep. at 357). CBRE issued that  
10 appraisal on February 3, 2016, valuing the property at \$13,800,000. Dkt. # 63 (cited herein as  
11 "Blake Decl." Ex. 6.<sup>3</sup> HHM shared this appraisal with the LP in July 2016, over six months  
12 before HHM exercised the option. Blake Decl. ¶ 4, Ex. 7.

13 In the fall of 2016, HHM began contacting lenders about financing for the buyout. Blake  
14 Decl., Ex. 5; Pritchard Decl. Ex. C (Tamaro Dep. at 443). Ms. Tamaro learned that lenders  
15 taking a security interest in the property would—as in 2001—likely require a cleanup. *See, e.g.,*  
16 Pritchard Decl. Ex. C (Tamaro Dep. at 343-44, 379); Ex. K (Wells Fargo letter declining loan).  
17 Potential lenders also wanted updated information relating to the contamination. *See, e.g., id.*  
18 Ex. C (Tamaro Dep. at 368 ("I would have needed that information to approach a lender."), 459  
19 (discussions with lender regarding updated Phase I)). As a result, Ms. Tamaro contacted EPI, the  
20 consulting firm that analyzed the soil on the property on behalf of the seller in 1999 and 2001, to  
21 update its historic environmental assessments and remediation cost estimates that were first  
22 completed in 2001. *Id.* Ex. L (Carp Dep. at 33 (discussing EPI's solicitation of remediation bids  
23 in 2001)). EPI provided its updated Planning-Level Remediation Cost Estimate on January 3,

---

24 <sup>3</sup> At the time of this appraisal no updated information about the costs of remediation was  
25 available. CBRE made the "extraordinary assumption" that the funds in the Environmental  
26 Escrow were sufficient. Pritchard Decl. Ex. J (Henderson Dep. at 60).

1 2017 and estimated the cleanup cost to range between \$1.5-2.5 million. Pettit Decl. Ex. 11. The  
 2 EPI representative testified that Ms. Tamaro never directed or communicated any expectation of  
 3 what EPI's estimate should be. Pritchard Decl. Ex. L (Carp Dep. at 112) ("I didn't have an  
 4 understanding that she was hoping to have a higher cost estimate."); *see also* Ex. C (Tamaro  
 5 Dep. at 374-75).

6 In January 2017, HHM obtained another appraisal of the Hidden Hills property from  
 7 CBRE for a tax appeal and shared with CBRE the updated Phase I and the Planning-Level  
 8 Remediation Cost Estimate prepared by EPI. *Id.* Ex. C (Tamaro Dep. at 394-95). CBRE's  
 9 appraisal, dated January 30, 2017, valued the property at \$13 million. Pettit Decl. Ex. 12. HHM  
 10 had no reason to show the tax appraisal to AMTAX 114 and did not do so. Pritchard Decl. Ex. C  
 11 (Tamaro Dep. at 389).

12 **D. AMTAX 114 Attempts to Force a Sale of the Property Before HHM**  
 13 **Exercises the Option**

14 On January 3, 2017, three days after Hidden Hills' compliance period ended, AMTAX  
 15 114 sent HHM a letter titled a "Required Sale Notice" under the LPA. Pritchard Decl. Ex. M.  
 16 In the letter, AMTAX 114 demanded that HHM "promptly use its best efforts to obtain a buyer  
 17 for Hidden Hills . . . on the most favorable terms available." *Id.* HHM responded that there was  
 18 no such requirement in the LPA and that any right the LP may have regarding its exit was  
 19 expressly subject to the GP's buyout option under Section 7.4.J. *Id.* Ex. N. HHM further stated  
 20 that it planned to exercise that option and advised the LP that it "has no right to prevent, or  
 21 interfere with, the general partner's exercise of its option." *Id.*

22 HHM exercised the option by letter dated March 14, 2017, and proposed some "ground  
 23 rules" for proceeding with the appraisal process. Blake Decl. Ex. 13.<sup>4</sup> The parties discussed the  
 24 process during March and April of 2017. On May 4, 2017, AMTAX 114 cut the discussions

---

25 <sup>4</sup> By March 14, 2017, AMTAX 114 had already started to reach out to brokers regarding  
 26 selling the property. *See, e.g.*, Pritchard Decl. Ex. O.

1 short, refusing to negotiate any procedure to implement Section 7.4.J and stating that the “only  
2 requirement” placed on the LP was to “select an MAI appraiser to determine the fair market  
3 value of its interests” effectively leaving the GP to complete the process called for under Section  
4 7.4.J without further involvement from the LP. Pritchard Decl. Ex. P.<sup>5</sup>

## 5 **E. The Three Appraisers: CBRE, C&W, and Colliers**

### 6 **1. CBRE**

7 Upon receiving AMTAX’s May 4, 2017 letter, HHM selected Todd Henderson, a MAI  
8 appraiser at CBRE, to appraise the property for the buyout option. As it had done previously,  
9 HHM sent to CBRE all relevant and material information regarding the property, including EPI’s  
10 initial Planning-Level Remediation Cost Estimate. Tamaro TRO Decl. ¶¶ 5,15. Ms. Tamaro  
11 told Mr. Henderson that she planned to ask a broker at CBRE, Tim Flint, for a broker’s opinion  
12 of the property’s value (BOV) to “have some idea of how the brokers will view the  
13 environmental issue.” Pritchard Decl. Ex. Q. Mr. Henderson talked to Mr. Flint and recalled  
14 him saying, “I could only tell you what the value would be with clean. I don’t have any idea  
15 how the market would handle the environmental contamination.” *Id.* Ex. J (Henderson Dep. at  
16 69). Mr. Henderson also spoke to other brokers and lenders regarding the contamination,  
17 considered the materials provided by Ms. Tamaro, and then conducted an independent appraisal  
18 of the Property. *Id.* at 38-39, 169. The report, dated June 7, 2017, valued the property at  
19 \$14,050,000, higher than the two prior CBRE appraisals. *See* Blake Decl. Ex. 19.

---

21  
22 <sup>5</sup> Despite withdrawing from the appraisal process, the LP continued to push the GP to  
23 agree to sell the property during the summer of 2017. *See* Mot. at 9-10. In August 2017,  
24 AMTAX 114’s outside counsel made a number of accusations and demands, including that the  
25 GP agree to market the property for sale. Pettit Decl. Ex. 25. By that point, the parties  
26 communicated only through counsel. Pritchard Decl. Ex. C (Tamaro Dep. at 471). Although  
AMTAX speculates that HHM was “feigning interest in marketing” (Mot. at 10), Ms. Tamaro  
testified that she seriously considered Alden Torch’s demand to market the property in August  
2017. Ex. C (Tamaro Dep. at 489).

1 Mr. Henderson testified that CBRE's appraisers are "independent and don't want to be  
 2 influenced in any way, shape or form by what someone thinks the property is worth." Pritchard  
 3 Decl. Ex. J (Henderson Dep. at 85); *see also* 169 ("our conclusions are reached independently of  
 4 other appraisals, other broker's opinions."). HHM provided Mr. Henderson no direction as to  
 5 valuation or suggested any desired value. *See id.* Ex. C (Tamaro Dep. at 392) ("Todd does not  
 6 give me a lower number, he gives me his market value."); Ex. J (Henderson Dep. at 174) ("If  
 7 you're implying did Catherine tell me the value to value the property, that absolutely was not  
 8 true ... and had she done that I would have declined the assignment").

## 9 2. Cushman & Wakefield

10 AMTAX 114 selected Andy Noble of Cushman & Wakefield ("C&W") to do the  
 11 appraisal on April 3, 2017. Pritchard Decl. Ex. R. Mr. Noble testified that AMTAX 114 did not  
 12 disclose the fact that the Property was contaminated with arsenic and lead until after he had  
 13 completed his draft on May 5, 2017, more than a month after he was retained. *Id.* Ex. S (Noble  
 14 Dep. at 24).<sup>6</sup> AMTAX 114 also never provided to C&W the remediation cost estimate from EPI,  
 15 although HHM had previously made it available to AMTAX 114. *Id.* Ex. S (Noble Dep. at 58);  
 16 Ex. G (HH Blake Dep. at 62). Mr. Noble testified that the omitted information was "material."  
 17 *Id.* Ex. S (Noble Dep. at 153). He further testified that he would have considered the cost of  
 18 remediation had it been provided to him, at the very least as a capital expense for deferred  
 19 maintenance. *See id.* at 113. In its report, C&W stated that "the cost of the remediation is not  
 20

---

21  
 22 <sup>6</sup> AMTAX 114 provided C&W with selected materials related to the contamination,  
 23 including the Phase I site assessment dated November 28, 2001, and information about the  
 24 Environmental Escrow, ***on May 9, 2017, four days after Mr. Noble's draft appraisal had been***  
 25 ***completed.*** Pritchard Decl. Ex. R at 2. The next day, after giving this voluminous (but still  
 26 incomplete) information less than a day's consideration, C&W provided AMTAX 114 with draft  
 language concluding that the contamination had no impact on the property's fair market value.  
*Id.* Ex. S (Noble Dep. at 128). After AMTAX 114 approved it, Mr. Noble included it in his final  
 report verbatim. *Id.* at 130; Ex. G (HH Blake Dep. at 61).

currently determinable” and valued the property at \$19,700,000, \$5,650,000 higher than the CBRE appraisal. Blake Decl. Ex. 15 (C&W Appraisal at 80).

### 3. Colliers

Because the CBRE and C&W appraisals were far apart, on September 6, 2017, Mr. Henderson and Mr. Noble nominated a third MAI appraiser. Their joint selection included two names, John Campbell at Colliers and Jeremy Streufert of Kidder Matthews. *See* Pettit Decl. Ex. 48. Mr. Campbell was recommended by Mr. Noble, who had a high level of confidence in his ability and his integrity. *See* Pritchard Decl. Ex. S (Noble Dep. at 14, 190). Catherine Tamaro had no prior relationship with either and retained Mr. Campbell because his name was first on the list. Tamaro TRO Decl. ¶ 17. Mr. Noble forwarded the email with their third appraisal nominations to Alden Torch the next day. Pettit Decl. Ex. 48.<sup>7</sup>

Colliers’ appraisal was prepared for the Partnership. Pettit Decl. Ex. 38; Pritchard Decl. Ex. U (Hutsell Dep. at 28) (“And so do you recall who your client was? A. Hidden Hills”). As the managing member of the Partnership’s GP, Ms. Tamaro was Colliers’ point of contact. Pettit Decl. Ex. 38. Pursuant to its standard practice, Colliers sought third-party environmental reports relating to the Partnership. Pritchard Decl. Ex. U (Hutsell Dep. at 36). Ms. Tamaro provided Colliers with all of the material information in her possession, including the updated EPI remediation cost estimate completed on August 8, 2017 and the updated Phase I. Tamaro TRO Decl. ¶¶ 18-19.

---

<sup>7</sup> AMTAX 114’s counsel stated that he did not learn about the third appraisal until September 22, 2017, when HHM’s counsel forwarded to him Todd Henderson’s September 6, 2017 email. Pettit Decl. ¶ 22, Ex. 31. Mr. Noble had in fact sent AMTAX the same email on September 7, 2017. *Id.* at Ex. 48. By September 22, 2017, AMTAX, Alden Torch, and its outside counsel knew that Colliers had been engaged to provide a third appraisal. Yet no one from AMTAX contacted Colliers before it issued its report more than a month later. Pritchard Decl. Ex. G (HH Blake Dep. at 72). AMTAX only reached out to Colliers after this litigation was filed in November 2017. *See, e.g.*, Pettit Decl. Ex. 43. Ms. Tamaro never instructed Colliers not to talk to AMTAX prior to the litigation. Pritchard Decl. Ex. C (Tamaro Dep. at 500).

1 Mr. Hutsell previously stated in a declaration that “[a]t no time during the process did I  
 2 feel that Ms. Tamaro attempted to influence me or my conclusions regarding the fair market  
 3 value of the property.” Dkt # 2-1 at 29 (Hutsell Decl. ¶ 11); *see also* Pritchard Decl. Ex. C  
 4 (Tamaro Dep. at 504) (“I didn’t give him instructions on how to write his appraisal.”). Mr.  
 5 Hutsell testified that the Colliers report “represented the independent appraisal of value based on  
 6 . . . all the information that was collected and reviewed by both him and John Campbell.” *Id.* Ex.  
 7 U (Hutsell Dep. at 162).

8 In addition to documents regarding the environmental contamination and the  
 9 Environmental Escrow, Colliers also considered information it collected independently from  
 10 lenders, brokers, and developers. *Id.* at 163. The BOV that Tim Flint prepared was one such  
 11 data point, as was the opinion of Armand Tiberio, another CBRE broker who believed financing  
 12 would be available on this property. *Id.* Ex. V; Ex. W.<sup>8</sup> Colliers gave all of this information the  
 13 due weight it deserved in its independent professional judgment, and issued its report on October  
 14 23, 2017, valuing the property at \$13,500,000. Pettit Decl. Ex. 33; Dkt. # 2-1 at 29 (Hutsell  
 15 Decl. ¶ 3); Ex. U (Hutsell Dep. at 83); *id.* at 23 (“we felt confident in what we were able to  
 16 determine and provide an estimate of value based on the information provided.”).

17 **F. AMTAX Refuses to Recognize the Third Appraisal and Purports to Remove**  
 18 **HHM as the General Partner, Resulting in this Litigation**

19 On November 3, 2017, AMTAX 114’s counsel wrote to HHM refusing to recognize its  
 20 buyout option. Pettit Decl. Ex. 47 at HHM-003181. It threatened to remove HHM as the GP  
 21 unless HHM agreed to either (1) abandon its option under § 7.4.J and sell the property using a  
 22 broker chosen by AMTAX or (2) agree that for purposes of § 7.4.J the value of the property was  
 23 \$21,300,000, *\$1.6 million above AMTAX’s own appraiser’s value.* *Id.* at HHM-003186. On  
 24 November 14, 2017, HHM filed suit in state court seeking a declaration that the final and binding

---

25 <sup>8</sup> Mr. Tiberio spent approximately 15 minutes on the Hidden Hills BOV. Pritchard Decl.  
 26 Ex. X (Flint Dep. at 56).

Colliers appraisal must be honored under the LPA. Dkt. # 1-1. AMTAX 114 responded by a letter dated November 30, 2017 that purported to remove HHM as the GP. Pettit Decl. Ex. 47.

In December 2017, AMTAX 114 removed the case to this Court and brought four counterclaims against HHM, including breach of contract, breach of fiduciary duty, a declaratory judgment regarding the option price, and for removal of HHM as GP. Dkt. # 16. All of AMTAX 114's counterclaims were predicated on the contention that AMTAX 114's buyout interest should have been higher because the costs of remediating the known contamination on the property should not have been taken into account by the appraisers. Months later, AMTAX 114 amended its counterclaims to assert a new claim for a declaratory judgment for indemnification. Dkt. # 24. Prior to this amendment, AMTAX had never provided any indication that it had any right to indemnification in the context of the buyout option, despite a flurry of letters and negotiations between AMTAX and HHM over a nearly a year.

### III. AUTHORITY AND ARGUMENT

AMTAX 114 asks the Court to rewrite the LPA by denying HHM its explicit buyout option under Section 7.4.J and instead force a sale of the property under Section 7.4.K. *See* LPA § 7.4.K (“Subject to the Option in Section 7.4.J above . . .”). This extraordinary remedy—that is contrary to the LPA's terms—is based on a barrage of accusations against Ms. Tamaro. But the facts underlying AMTAX's accusations are either speculative (e.g., Ms. Tamaro improperly “influenced” the appraisers) or disputed (e.g., whether the effect of contamination on the market price is “real”). Even if these accusations were material to the interpretation of the LPA—and they are not—these disputes would present triable issues that preclude summary judgment. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013); Fed. R. Civ. P. 56.

But AMTAX's accusations and speculation are not relevant to the exercise of the GP's buyout right. The LPA contemplated the potential for a disagreement over value, just like the one here, by implementing the third appraisal mechanism. Section 7.4.J is unambiguous and the facts relevant to it are not in dispute. The option has been validly exercised, the independent

1 appraisal process is complete, and the third appraisal is, by definition, “final and binding.” And  
 2 by its own plain terms, the Indemnity has not been triggered. HHM has delivered all the LIHTC  
 3 benefits to which AMTAX 114 was entitled under the LPA over a fifteen year period. HHM is  
 4 now entitled to the benefit of its bargain under the LPA: a declaration that the buyout must  
 5 proceed and the third appraisal’s valuation controls.

6 **A. HHM is Entitled to Declaratory Judgment that the Colliers Appraisal is**  
 7 **“Final and Binding”**

8 Under LPA § 7.4.J, the buyout option does not require AMTAX’s consent. The third  
 9 appraisal is final and binding. AMTAX does not like § 7.4.J or the third appraisal and seeks to  
 10 frustrate the buyout option and the binding appraisal by an end run--removing the GP. It relies  
 11 on Washington case law holding that the terms of an option contract are strictly construed. Mot.  
 12 at 16. That may be true, as far as it goes, but reading a contract’s terms strictly does not permit  
 13 the Court to add terms that are not there. *See Hardy v. Hartford Ins. Co.*, 236 F.3d 287, 291 (5th  
 14 Cir. 2001) (“rule[s] of strict construction do[] not authorize a perversion of language, or the  
 15 exercise of inventive powers”).

16 For example, although insurance contracts are strictly construed against the insurer, “a  
 17 strict application should not trump the plain, clear language of an exclusion . . . [i]n Washington  
 18 the expectations of the insured cannot override the plain language of the contract.” *Kut Suen Lui*  
 19 *v. Essex Ins. Co.*, 185 Wn. 2d 703, 712, 375 P.3d 596 (2016). The same rationale applies to  
 20 option contracts. *See, e.g.*, 17A C.J.S. Contracts § 430 (“As is true for contracts more generally,  
 21 if the language is clear, there is no room for the application of rules of construction; however, if  
 22 the language is ambiguous, an option is to be strictly construed.”) (citing, among other cases,  
 23 *Pardee v. Jolly*, 163 Wn. 2d 558, 182 P.3d 967 (2008)).

24 AMTAX 114 concedes that § 7.4.J is unambiguous, and does not dispute that all  
 25 conditions precedent to exercising the option have been met. Mot. at 17. As a result, this Court  
 26 should apply the plain terms of the agreement. The LPA provides, in relevant part, that the

option price is determined by the fair market value of the property held by the Partnership, which “shall be determined by two independent MAI appraisers: one selected by [HHM] and one by [AMTAX 114]. If such appraisers are unable to agree on the value, they shall jointly appoint a third independent MAI appraiser whose determination shall be final and binding.” *See* Pettit Decl., Ex. 1 (LPA § 7.4.J). AMTAX contends this language was not followed in two ways: (1) CBRE and C&W did not “attempt to agree on a value” before appointing the third appraiser and (2) CBRE and C&W did not “jointly appoint” the third appraiser. Mot. at 17-18. Neither contention provides any basis to negate HHM’s option and disregard the “final and binding” appraisal.

**First**, there is no requirement in Section 7.4.J that the first two appraisers “attempt” to agree on value, the provision states only that if they are “unable to agree on the value” they move on to the third appraiser. The CBRE valuation of Hidden Hills was \$14,050,000 and the C&W valuation was \$19,700,000. *Compare* Blake Decl. Ex. 15 with Ex. 19. The two appraisals were \$5,650,000 apart, a disagreement that speaks for itself. As AMTAX’s own representative recognized it 2015, a buyout price gap of several million dollars is a “non-starter.” Blake Decl. Ex. 5.<sup>9</sup> If more is required, contrary to assertions in AMTAX’s motion, Andy Noble and Todd Henderson did in fact speak and concluded “that the values were not the same, and there needed to be a third appraiser hired.” Pritchard Decl. Ex. S (Noble Dep. at 221).

**Second**, AMTAX argues that because Henderson and Noble jointly appointed two firms, Colliers and Kidder Matthews, as opposed to a single one, Section 7.4.J was not followed. Mot. at 18. AMTAX fails to explain why this matters and neglects to mention that John Campbell of Colliers was suggested by Andy Noble, **AMTAX’s own appraiser**. *See* Pritchard Decl. Ex. S (Noble Dep. at 14, 190). Henderson testified that “we agreed on the telephone call that . . . we

---

<sup>9</sup> Incidentally, AMTAX did nothing to encourage C&W to “attempt” to agree on a value with CBRE. Pritchard Decl. Ex. G (HH Blake Dep at 72).

would appoint John Campbell” because—like Noble—Henderson believed Campbell to be a fine choice. *Id.* Ex. J (Henderson Dep. at 156). And it is undisputed that Catherine Tamaro had no prior relationship with either and retained Campbell because he was first on the list. Tamaro TRO Decl. ¶ 17. There was nothing secret about the selection process. Andy Noble forwarded the email jointly nominating John Campbell to his contact at AMTAX 114 the next day. *See* Pettit Decl., Ex. 48. AMTAX 114’s representative testified that AMTAX never contacted Colliers during the two months before the appraisal was issued. Pritchard Decl. Ex. G (HH Blake Dep. at 72). AMTAX cannot wait to see whether it likes the appraisal before attacking the process, much less when the appraiser it now dislikes was nominated by Mr. Noble.

AMTAX argues in the alternative that its accusations against Ms. Tamaro (which HHM disputes) mean that her actions violated “the clear purpose of Section 7.4.J.” Mot. at 18. It cites to no contractual language in support of this argument. *Id.* AMTAX 114 appears to suggest that the appraisers were not “independent.” If so, the record is to the contrary. When asked if Catherine Tamaro tried to influence CBRE’s conclusions, Mr. Henderson testified:

No. I believe Catherine was giving me factual data. If you're implying did Catherine tell me the value to value the property, that absolutely was not true and would not have happened, and had she done that I would have declined the assignment.

Pritchard Decl. Ex. J (Henderson Dep. at 174). Cory Hutsell unequivocally testified that the Colliers appraisal was not based on any preconceived idea or approach and that the report represented his independent judgment. *Id.* Ex. U (Hutsell Dep. 162-163). He submitted a declaration earlier in this case confirming the same. Dkt # 2-1 at 29 (Hutsell Decl. ¶ 11).

AMTAX offers no competent evidence to cast doubt on the sworn testimony of Mr. Henderson and Mr. Hutsell and resorts to insinuations about their credibility. *See* Mot. at 13 (listing bullet points that consist entirely of speculation). This is not enough to defeat (much less prevail on) a summary judgment motion. *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008) (the “argument in opposition to summary judgment boils down to an allegation that ... the

1 stated reasons for the school's actions are phony. . . . The [nonmoving party] correctly note[s]  
 2 that evaluations of witness credibility are inappropriate at the summary judgment stage. . . .  
 3 However, when challenges to witness' credibility are *all* that a plaintiff relies on, and he has  
 4 shown no independent facts-no proof- to support his claims, summary judgment in favor of the  
 5 defendant is proper." ) (internal citations omitted). *See also Trentadue v. Redmon*, 619 F.3d 648,  
 6 652 (7th Cir. 2010) (a party opposing summary judgment must carry the burden to "show more  
 7 than some metaphysical doubt as to the material facts . . . and neither speculation nor generic  
 8 challenges to a witness's credibility are sufficient to satisfy this burden.").

9 The CBRE and Colliers appraisers testified their appraisals represented their independent  
 10 professional judgment. Although Mr. Noble admitted that AMTAX failed to provide him with  
 11 material information, HHM accepts for the purposes of this motion that C&W too was  
 12 independent. Under § 7.4.J, the Colliers appraisal controls as a matter of law.

### 13 **B. AMTAX 114 Is Not Entitled to Any Indemnification**

14 As a last resort, AMTAX argues that if it must proceed with the buyout under § 7.4.J, the  
 15 GP must indemnify it for any diminution of its interest's value related to the contamination.  
 16 AMTAX misreads the Indemnity, which has an entirely different purpose.

17 The Indemnity states that in consideration for AMTAX 114 acquiring a limited  
 18 partnership interest in the Partnership, the GP agrees to hold AMTAX 114 harmless "from  
 19 environmental liabilities" to the extent set forth in the agreement. Paragraph 2, which is unique  
 20 to the Hidden Hills Partnership, describes the soil contamination, defined as "Environmental  
 21 Condition." It states that

- 22 • the soils on the Property contain elevated levels of arsenic and lead as  
 23 detailed in EPI's Draft Soil Characterization Report, above 20 g per kg,
- 24 • Ecology was conducting a study to determine a cleanup level but was not  
 25 at the time requiring properties to comply with the 20 mg per kg level;

- “as such time as Ecology determines a cleanup level for arsenic in soils,” the GP would “take such actions as are necessary to comply with such cleanup level.”

Aside from Paragraph 2, the Indemnity is a standard form, drafted and used by AMTAX in many partnerships. *See* Pritchard Decl. Exs. D, E.

In Paragraph 3, the GP warrants that, except for the Environmental Condition described in Paragraph 2, there are “no investigations, inquiries, orders, hearings, actions or other proceedings by ... any governmental agency ... pending or ... threatened in connection with any Hazardous Substance Activity in violation of any applicable Environmental laws.”

Paragraph 4 is the “indemnity” section of the agreement. It contains form language found in many AMTAX partnerships and provides in full:

The Indemnitor [HHM] agrees to indemnify, hold harmless and defend the Company [AMTAX 114] from and against any and all claims, costs, litigation, proceedings, investigations, loss, damage, liability, fine, penalty, assessment or expense, and/or loss, or deferment or delay of distributions from Hidden Hills to the Company (collectively referred to as “Environmental Liability”) arising from, or as a result of, or relating to, any Hazardous Substance, Hazardous Substance Activity or violation of Environmental Laws or ADA Laws, on the, or adversely affecting the, Property. Defense of the Company by Indemnitor shall be provided by competent counsel of Indemnitor's choice, and the Company shall reasonably cooperate in such defense.

Pettit Decl. Ex. 2 (Indemnity ¶ 4). “Distributions” is undefined.

“Indemnity agreements are essentially agreements for contractual contribution, whereby one tortfeasor, against whom damages in favor of an injured party have been assessed, may look to another for reimbursement.” *Stocker v. Shell Oil Co.*, 105 Wn. 2d 546, 549, 716 P.2d 306 (1986). The indemnity provided for in Paragraph 4 is no different. By its terms, it is triggered by some **third-party action** —“claims, costs, litigation, proceedings, investigations, loss, damage, liability, fine, penalty, assessment or expense and/or loss, or deferment or delay of distributions” —under environmental or ADA laws, related to contamination “on the ... or ... affecting the property.” *See also* Preamble (the purpose of the agreement is to “indemnify and hold harmless

1 [Amtax 114] *from environmental liabilities.*”) (emphasis added).

2 The indemnity places on the GP alone the risk of potential third-party action resulting  
3 from the contamination and associated costs. If, for example, Ecology mandated a cleanup of  
4 arsenic-contaminated soils or a tenant brought suit for personal injury to a child caused by lead  
5 exposure, the defense and associated costs (e.g., mandatory clean-up or settlement of the  
6 personal injury claim) would be borne by the GP alone. And, if the Partnership’s funds were tied  
7 up in the interim and AMTAX 114 did not receive regular distributions (or received reduced  
8 distributions), AMTAX 114 would be required to be made whole by the GP.

9 No such triggering event has materialized. As of the date the GP exercised its buyout  
10 option under § 7.4.J—or to date—no environmental claims have been brought, no related costs  
11 incurred, and no related distributions to AMTAX 114 lost, deferred or delayed. And of course  
12 the GP alone remains responsible for any future claims. In other words, while being the LP,  
13 AMTAX 114 has been protected from the risk of environmental actions and related costs and has  
14 no exposure to that risk after its LP interest is bought out by the GP.

15 But AMTAX wants more. It stretches the reference to “loss, or deferment or delay of  
16 distributions” in Paragraph 4 to argue that the GP must indemnify it against the diminution of  
17 Hidden Hills property’s *value* related to the lead and arsenic contamination after the buyout.  
18 AMTAX’s reading of “loss, or deferment or delay of distributions” makes it into an independent  
19 guarantee of property value, which is nowhere mentioned in Paragraph 4 or anywhere else in the  
20 Indemnity. If the original parties intended for the GP to guarantee the LP a certain “value,” they  
21 would have done so explicitly, most logically in Paragraph 2, which was drafted specifically to  
22 address the environmental situation unique to Hidden Hills. They would have also specified  
23 which of the many possible “values” (e.g., tax value, appraised value, fair market value) they had  
24 in mind. But the parties did not do so *because the risk of an enforcement action or a personal*  
25 *injury claim has nothing to do with the property’s value.* Under the Indemnity’s unambiguous  
26 terms value is irrelevant. The Court should refuse AMTAX’s request to rewrite the Indemnity

1 by inserting a term the parties never intended to include. *See* Sullivan Decl., Gibson Decl.

2 AMTAX's reading is also contrary to familiar rules of contract interpretation. "Words in  
3 a series should be interpreted in relation to one another." *Ali v. Fed. Bureau of Prisons*, 552 U.S.  
4 214, 229 (2008). *See also United States v. Williams*, 553 U.S. 285, 294 (2008) ("a word is given  
5 more precise content by the neighboring words with which it is associated"). Courts therefore  
6 "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying  
7 words." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015). *See also California State*  
8 *Legislative Bd., United Transp. Union v. Dep't of Transp.*, 400 F.3d 760, 763 (9th Cir. 2005);  
9 *Ball v. Stokely Foods*, 37 Wn. 2d 79, 87, 221 P.2d 832 (1950) ("Washington courts apply these  
10 rules when interpreting contracts."); *Lombardo v. Pierson*, 121 Wn. 2d 577, 583, 852 P.2d 308  
11 (1993) (applying *ejusdem generis* to contract interpretation).

12 Because the phrase "loss, deferment or delay of distributions" follows a long list of third-  
13 party actions—"claims, costs, litigation, proceedings, investigations, loss, damage, liability, fine,  
14 penalty, assessment or expense *and/or loss, deferment or delay of distributions*"—it must be  
15 interpreted consistently with the preceding examples, not in isolation. Namely, if the Partnership  
16 is short of money as a result of enforcement action by Ecology or a personal injury claim arising  
17 out of contamination, the LP's distributions cannot be reduced. But there is no Indemnity  
18 ***without some third-party action***, otherwise the long list of such actions at the beginning of the  
19 phrase would be meaningless. AMTAX's reading fails as a matter of law.

20 AMTAX is not really complaining about distributions, it is complaining that the  
21 appraised value of Hidden Hills is lower than it hoped. But disagreements about value are  
22 resolved through the appraisal process contained in the LPA. Nothing in the Indemnity promised  
23 the LP any particular value of its interest. Instead it required the GP to hold AMTAX "harmless"  
24 from third-party claims and expenses related to contamination. AMTAX has received the full  
25 benefit of the Indemnity. Nothing happened. The Partnership purchased the Property in 2002  
26 for \$8,900,000, at a discount reflecting the known environmental contamination. AMTAX 114

1 benefited from the reduced price when investing in the Partnership. The Property is now being  
 2 valued at \$13,500,000. AMTAX 114's 99.9 percent interest has increased proportionately, no  
 3 loss by any measure.

4 AMTAX hedged against a risk that did not materialize. Any future risk of remediating  
 5 the contamination is borne by the GP alone. The indemnity claim therefore fails as a matter of  
 6 law. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 100,  
 7 285 P.3d 70 (2012) ("In order to prove an indemnity claim, a plaintiff must demonstrate that  
 8 there exists a contract containing an indemnity provision that binds the defendant to reimburse  
 9 the plaintiff for the amount claimed.").

#### 10 **C. AMTAX 114 Is Not Entitled to Removal**

11 AMTAX 114 seeks the GP's removal so that it can strip it of its option rights under  
 12 §7.4.J and sell the Hidden Hills Property under §7.4.K. The sale was AMTAX's "preferred  
 13 outcome" since the time the compliance period ended. Pritchard Decl. Ex. G (HH Blake Dep. at  
 14 14-15). AMTAX first tried to get what it wanted by pressuring HHM to give up the option rights  
 15 under §7.4.J. It threatened removal unless the GP agreed to let the LP market the property and  
 16 give up its option, or agree to the property a value of \$21,300,000, \$1.6 million higher than  
 17 C&W's appraisal.<sup>10</sup> See Pettit Decl. Ex. 47 at HHM-003186. When the GP rejected these  
 18 demands, AMTAX attempted to frustrate the option entirely by removing the GP. Its tactics fail  
 19 as a matter of law.

20 **First**, as in Parkway, there is no dispute here that all conditions precedent to exercise of  
 21 the option have been met. As a result, Washington law holding that the option must be protected  
 22 from interference by its grantor applies with equal force here, where AMTAX seeks to eliminate  
 23 the option entirely through the GP's removal. See, e.g., *Thompson v. Thompson*, 1 Wn. App.

24 \_\_\_\_\_  
 25 <sup>10</sup> This extortionate demand was similar to AMTAX's tactic in Parkway, where it  
 26 insisted that the GP give up \$2.7 million in accounts payable as a condition of AMTAX's  
 approval of the buyout option.

1 196, 200, 460 P.2d 679 (1969); *Barnett v. Buchan Baking Co.*, 45 Wn. App. 152, 160, 724 P.2d  
 2 1077 (1986); *McFerran v. Heroux*, 44 Wn. 2d 631, 638, 269 P.2d 815 (1954)). Indeed, AMTAX  
 3 114 admitted that its purported removal resulted in negating the option. *See* Pritchard Decl. Ex.  
 4 G (HH Blake Dep. at 25) (“If the general partner is removed ... would it be able to complete the  
 5 buyout process? A. No.”). Under these authorities protecting options under Washington law,  
 6 AMTAX cannot defeat the option by purporting to remove the GP more than six months after the  
 7 option had been exercised. Just as in Parkway, if AMTAX 114 actually had any viable damages  
 8 claims, it could bring those separately against HHM without blocking the option.

9 **Second**, AMTAX misunderstands the nature of the GP’s fiduciary duties and how they  
 10 apply in the context of negotiating a right unique to the GP. There is no basis for any contention  
 11 that HHM was acting “on behalf of a party having an interest adverse to the limited partnership.”  
 12 *See* Mot. at 23. Instead, the issue is whether it is a breach of duty to act in furtherance of one’s  
 13 interest in exercising the GP’s right to buy out an LP. Under Washington law, it is not, because  
 14 “a partner does not violate a duty or obligation under this chapter or under the partnership  
 15 agreement merely because partner’s conduct furthers the partner’s own interest.” RCW  
 16 25.05.165(5). *See also J & J Celcom v. AT&T Wireless Servs. Inc.*, 162 Wn.2d 102, 113, 169  
 17 P.3d 823 (2007) (“Under RUPA, partners need not obtain the consent of their copartners as a  
 18 precondition for pursuing their own self-interest.”).<sup>11</sup>

19 In *RSD AAP, LLC v. Alyeska Ocean, Inc.*, the Washington Court of Appeals found no  
 20 breach of fiduciary duty when one partner, “on its own behalf as an individual partner,” sought to  
 21 purchase another partner’s interest in the partnership. 190 Wn.App. 305, 358 P.3d 483 (2015).

---

22  
 23 <sup>11</sup> Courts in Delaware have articulated a similar common law principle of fiduciary  
 24 duties; “the duty to put the ‘best interest of the corporation and its shareholders’ above ‘any  
 25 interest ... not shared by the stockholders generally’ does not mean that the controller has  
 26 to subrogate his own interests so that the minority stockholders can get the deal that they want.”  
*In re Synthes, Inc. S’holder Litig.*, 50 A.3d 1022, 1040–41 (Del. Ch. 2012). This is exactly what  
 AMTAX 114 is asking for the Court to do.

1 Citing RCW 25.05.165(5), the court held that the partner “did not violate the duty of loyalty or  
 2 any other obligation imposed because it sought an opportunity for itself as a partner in the  
 3 enterprise.” *Id.* at 322. Courts in other states applying identical statutory language have reached  
 4 similar conclusions. *See, e.g., Welch v. Via Christi Health Partners, Inc.*, 133 P.3d 122, 142  
 5 (2006) (“a partner may legitimately pursue self-interest instead of solely the interest of the  
 6 partnership and the other partners as must a trust trustee” and that the limited partner’s  
 7 allegations “must be considered in this light”); *Holloway v. Evers*, No. M2006-01644-COA-R3-  
 8 CV, 2007 WL 4322128 (Tenn. Ct. App. Dec. 6, 2007) (applying same principle to buyout of a  
 9 partner’s interest by other partners).

10 Under RCW 25.05.165(5), it could not have been a breach of duty for the GP to share  
 11 with the appraisers information about the environmental contamination issues on the property,  
 12 even if the disclosures did have the effect of reducing the price to buy out the LP. There is no  
 13 question that the contamination is real and of public record, and was admitted by Mr. Noble to be  
 14 material information. *See* Pritchard Decl. Ex. T (AMTAX admitting the property is on  
 15 Ecology’s Contaminated Site List); Ex. S (Noble Dep. at 152-53). AMTAX 114 also does not  
 16 (and cannot) contend that HHM provided false information to any appraiser or concealed  
 17 anything from an appraiser (as AMTAX did). Instead, the crux of AMTAX’s argument is that  
 18 HHM should **not** have disclosed facts related to the known contamination of the property and the  
 19 potential costs of remediation. But there is **no duty to conceal** known material facts from an  
 20 appraiser, as a matter of law.

21 The opposite is true. There is a statutory duty to disclose to a potential buyer that the  
 22 property site is contaminated. *See* RCW 64.06.013. A buyer may not waive the right to receive  
 23 disclosure of environmental contamination. RCW 64.06.010(7), and a seller that fails to disclose  
 24 known environmental contaminants faces liability for rescission or fraud. *See, e.g., Jackowski v.*  
 25 *Borchelt*, 174 Wn.2d 720, 737, 278 P.3d 1100 (2012). HHM did not breach any duty by  
 26 following Washington law and providing the required disclosures to CBRE and Colliers.

OPPOSITION AND CROSS MOTION FOR SUMMARY JUDGMENT  
 (3:17-cv-06048-RBL) - 22

1 The Colliers appraiser considered the contamination and cost of remediation to be  
 2 material facts affecting the fair market value of the property. Dkt # 2-1 at 29 (Hutsell Decl. ¶ 9).  
 3 See also Pritchard Decl. Ex. U (Hutsell Dep. at 102) (“basically a lender would expect some  
 4 deduction for remediation of soil from the value as if clean in order to, you know, that would  
 5 determine the as-is value.”). He also considered the input from CBRE brokers that the  
 6 contamination would not impact the availability of financing, as well as the input from actual  
 7 lenders indicating that it would. Compare Ex. U (Hutsell Dep. at 74-75) with *id.* at 80 (“during  
 8 the appraisal process we discovered that, in talking with lenders, that it would have to be  
 9 cleaned”). Colliers’ appraisers also received Tim Flint’s BOV, and gave it whatever due weight  
 10 they felt it deserved. Pritchard Decl. Ex. V; Pettit Decl. Ex. 21.<sup>12</sup> In Colliers’ view, the potential  
 11 lack of financing reduces the pool of potential buyers, which in turn, would reduce the fair  
 12 market value of the property. Dkt # 2-1 at 29 (Hutsell Decl. ¶¶ 9-10). Colliers reached that  
 13 decision independently after consideration of all of the material information disclosed by HHM.  
 14 *Id.* ¶ 11; Pritchard Decl. Ex. U (Hutsell Dep. at 162). There was no breach of fiduciary duty.

15 **Third**, AMTAX misunderstands the removal provision in the LPA. Section 4.5A(iv)(2)  
 16 provides for removal only when a GP “violate[s] any rights, powers, duties, representations or  
 17 warranties as set forth in Article VII herein or shall have violated any material provision of this  
 18 Agreement, **and such misconduct or failure to exercise reasonable care can reasonably be**  
 19 **expected to cause economic detriment to the Partnership or the Project.**” LPA § 4.5A(iv)(2)  
 20 (emphasis added). As an initial matter, AMTAX has not proved any violation of Article VII or  
 21 material breach of the LPA for the reasons set forth above. But even if it had, AMTAX’s claim

---

22  
 23 <sup>12</sup> Under the LPA, the BOV is irrelevant. Brokers are not MAI appraisers. Mr. Flint’s  
 24 BOV includes a disclaimer that it “is not an appraisal and has not been performed in accordance  
 25 with the Uniform Standards of Professional Appraisal Practice.” Pettit Decl. Ex. 21 at 2. A  
 26 disclaimer is required if a broker provides an opinion of value in litigation. See RCW  
 18.140.020(6). But even if it was relevant, Catherine Tamaro told Colliers about the BOV, and  
 the appraisers “weren’t interested in it.” Pritchard Decl. Ex. C (Tamaro Dep. at 498).

1 for removal would still fail because there no evidence that any actions taken by HHM could  
 2 “reasonably be expected to cause economic detriment to the Partnership or the Project.”  
 3 AMTAX claims only that *it* will be harmed by the disclosure of the contamination to the  
 4 appraisers. It is *not* seeking any damages on behalf of the Partnership. Pritchard Decl. Ex. T  
 5 (interrogatory answer stating AMTAX 114 is “not seeking damages on behalf of the Partnership  
 6 in connection with its counterclaims in this action.”). As a result, AMTAX 114 has not and  
 7 cannot prove any reasonable expectation of economic detriment *to the Partnership* in connection  
 8 with an action taken by HHM to buy out the LP’s interest. Removal is therefore unavailable.

#### 9 IV. CONCLUSION

10 For the foregoing reasons, HHM requests that the Court enter the attached order  
 11 providing the following relief: (1) denying AMTAX 114’s motion for summary judgment, (2)  
 12 granting HHM’s cross-motion for summary judgment, (3) entering judgment in favor of HHM’s  
 13 claim for declaratory relief and specific performance, and (4) dismissing each of AMTAX 114’s  
 14 Hidden Hills-related counterclaims (Counts One through Five in AMTAX’s answer and  
 15 counterclaims).

16  
 17 DATED: February 11, 2019

/s/ Rita V. Latsinova

David R. Goodnight, WSBA No. 20286

Rita V. Latsinova, WSBA No. 24447

J. Scott Pritchard, WSBA No. 50761

600 University Street, Suite 3600

Seattle, WA 98101

Phone: (206) 624-0900

Facsimile: (206) 386-7500

Email: david.goodnight@stoel.com

Email: rita.latsinova@stoel.com

Email: scott.pritchard@stoel.com

Attorneys for Plaintiff Hidden Hills  
 Management LLC and 334th Place 2001, LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on the 11th day of February, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following participants:

- **David J. Burman**  
dburman@perkinscoie.com,docketsea@perkinscoie.com
- **Christopher G Caldwell**  
ccaldwell@bsfllp.com,BSF\_LAD\_Records@BSFLLP.com
- **David R Goodnight**  
DRGOODNIGHT@STOEL.COM,SEA\_PS@stoel.com,docketclerk@stoel.com,jamie.dombek@stoel.com
- **Margarita V. Latsinova**  
[rvlatsinova@stoel.com](mailto:rvlatsinova@stoel.com),[sea\\_ps@stoel.com](mailto:sea_ps@stoel.com),[docketclerk@stoel.com](mailto:docketclerk@stoel.com),  
debbie.dern@stoel.com
- **Steven Douglas Merriman**  
smerriman@perkinscoie.com,docketsea@perkinscoie.com,JTanzy@perkinscoie.com
- **Eric S Pettit**  
epettit@bsfllp.com
- **J. Scott Pritchard**  
[scott.pritchard@stoel.com](mailto:scott.pritchard@stoel.com),[sea\\_ps@stoel.com](mailto:sea_ps@stoel.com),[docketclerk@stoel.com](mailto:docketclerk@stoel.com),[eileen.mccarty@stoel.com](mailto:eileen.mccarty@stoel.com)
- **Arwen Johnson**  
ajohnson@bsfllp.com
- **Grayce S. Zelphin**  
gzelphin@bsfllp.com

Dated February 11, 2019.

s/ Debbie Dern  
Debbie Dern  
Legal Practice Assistant  
Stoel Rives LLP  
debbie.dern@stoel.com